

# THE STATE OF NEW HAMPSHIRE

## SUPREME COURT

**In Case No. 2005-0339, Joseph E. Sullivan, III v. Town of Conway, ZBA, the court on May 18, 2006, issued the following order:**

The plaintiff, Joseph E. Sullivan, III, appeals an order of the trial court upholding a decision of the Town of Conway's Zoning Board of Adjustment (ZBA) finding that: (1) he violated a town ordinance prohibiting the use of properties in the town for helicopter landings; and (2) his heliport was not a grandfathered use. We affirm.

We will uphold the superior court's decision unless it is not supported by the evidence or is legally erroneous. Boccia v. City of Portsmouth, 151 N.H. 85, 89 (2004). The superior court shall not set aside or vacate the ZBA's decision except for errors of law, unless the court is persuaded by the balance of the probabilities, on the evidence before it, that the decision is unreasonable. Id.

On appeal, the plaintiff argues that the trial court erred in: (1) upholding the decision of the ZBA that he had not established that his helipad was a nonconforming use; (2) failing to consider the effect of RSA 674:16, V (1996), which established the helipad as an accessory use; and (3) failing to find that the accessory use of his property could not be taken away without compensation under Part I, Articles 2 and 12 of the New Hampshire Constitution and the Fourteenth Amendment to the United States Constitution.

Zoning ordinances adopted under RSA 674:16 (Supp. 2005) do not apply to structures or uses in existence at the time of the enactment of the zoning ordinance. See RSA 674:19 (1996). A nonconforming use is a lawful use existing on the land at the time an ordinance prohibiting that use is adopted. Town of Salem v. Wickson, 146 N.H. 328, 330 (2001). The right to maintain nonconforming uses is meant to protect property owners from a retrospective application of zoning ordinances, so that property owners may continue using and enjoying their property when their uses were lawful prior to the enactment of a zoning ordinance. Id. An existing use means utilization of premises so that they may be known as being employed in the neighborhood for a given purpose. Wunderlich v. Webster, 117 N.H. 283, 285 (1977).

A review of the record reveals that the trial court did not commit error by upholding the ZBA's determination that the plaintiff had failed to establish that his helipad was a nonconforming use. The trial court noted that the "ZBA

received evidence from both sides,” and that the ZBA found that the “evidence against the purported nonconforming use outweighed that in favor of it.” The record supports this finding. Although the plaintiff presented affidavits from pilots who landed helicopters and from a contractor who stated that he cleared the site in 1995 for the use of the helipad, affidavits were also presented showing that the helipad was not in use until 2003, after the zoning ordinance was adopted, and a survey and aerial photograph contradicted the plaintiff’s claim.

The plaintiff bears the burden of demonstrating to the trial court that the ZBA’s decision was unlawful or unreasonable. See RSA 677:6 (1996). Based upon the record before us, we cannot conclude that the trial court’s order upholding the ZBA’s decision with respect to the nonconforming use issue was unlawful or unreasonable.

The plaintiff also contends that the trial court erred by failing to consider his argument concerning the application of RSA 674:16, V (Supp. 2005), which was enacted in 1996 and established that aircraft landings and take offs on private land by the owner were valid and permitted accessory uses unless specifically proscribed by local land use regulation. If we construe this argument literally, we find no evidence in the record that the plaintiff ever alerted the trial court to its alleged error and therefore conclude that the issue has not been preserved for our review. See Starr v. Governor, 151 N.H. 608, 611 (2004); N.H. Dep’t of Corrections v. Butland, 147 N.H. 676, 679 (2002) (appellant’s claim that trial court erred by applying wrong standard of review in its order not preserved because appellant failed to raise issue in motion for reconsideration); Bean v. Red Oak Prop. Mgmt., 151 N.H. 248, 250 (2004) (failure of moving party to demonstrate that he raised issues on appeal before trial court may be considered by supreme court regardless of whether opposing party objects on those grounds). If his argument is that the trial court erred in applying this statute to the facts of this case, we note that he concedes that, to prevail on the merits of this issue, he was required to establish that he constructed the helipad and established that take offs and landings occurred prior to November 20, 1997. In his request for findings and rulings, he specifically requested a finding that he “made actual use of the helipad prior to November 20, 1997.” In its order which denied the plaintiff’s appeal, the trial court granted only those findings which were consistent with its order. We further note the trial court’s finding that ample testimony was provided that the helicopter use did not begin until 2003. We find no error in the trial court’s conclusion.

Affirmed.

DUGGAN, GALWAY and HICKS, JJ., concurred.

**Eileen Fox,**

**Clerk**